National Association of Broadcast Employees and Technicians, AFC Local 15, AFL-CIO *and* Lee Rothberg Productions, Inc. and Directors Guild of America, Inc. Case 2-CD-635

February 19, 1982

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed on March 25, 1981, by Lee Rothberg Productions, Inc. (herein the Employer), alleging that National Association of Broadcast Employees and Technicians, AFC Local 15, AFL-CIO (herein NABET), had violated Section 8(b)(4)(D) of the Act.

Pursuant to notice, hearing was held in New York, New York, on April 23, 29, and 30 and May 7, 1981, before Hearing Officer Pearl Zuchlewski. The Employer, NABET, and Directors Guild of America, Inc. (herein the Guild), appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, briefs were filed by the Employer, NABET, and the Guild.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.[1]

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The Employer, a New York corporation with its principal office and place of business in New York, New York, is engaged in the business of producing television commercials. During the past year, in the course and conduct of its business operations, the Employer derived gross revenues in excess of $1 million and purchased and received goods and supplies valued in excess of $50,000 directly from sources located outside the State of New York. Accordingly, we find that the Employer is engaged in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that NABET and the Guild are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

The Employer is engaged in the business of producing television commercials, some on film but most on video tape. The work in dispute involves the timing function performed in connection with the production of video tape television commercials. This timing function consists of using a stopwatch to time segments and the overall length of a television commercial and of verifying that the segments total the allotted overall time. The individual who performs this work also takes notes which are used in editing the commercial and confers with the producer and director when production is completed.

Since 1975, the Employer has used both script supervisors represented by NABET and associate directors represented by the Guild to perform the disputed timing function. In late 1980, the Guild fined Lee Rothberg, the Employer's president and a Guild member, for using non-Guild members (i.e., NABET script supervisors) to perform the disputed timing function. Rothberg testified that the Guild also threatened that it would strike the Employer and that it would refuse to enter into any future contracts with the Employer unless it assigned the timing function to associate directors whom it represents. Thereafter, the Employer assigned the disputed work to associate directors represented by the Guild and they continued to perform the work at the time of the hearing in this proceeding.

By letters dated December 30, 1980, and March 6, 1981, NABET notified the Employer that it was being fined certain specified amounts for failing to abide by the terms of its contract and employ NABET script supervisors to perform the disputed work. Furthermore, on March 24, 1981, James Wilson, NABET's associate business manager, contacted the Employer and threatened to strike unless the Employer met NABET's demand.

On March 25, 1981, the Employer filed the instant charge.

[1] The Guild has filed a motion to reopen the hearing to allow it to adduce testimony that it claims the Hearing Officer improperly precluded. Thus, it claims that it was prejudiced by rulings related to the issues of pretext, efficiency, industry practice, and credibility. As we have found that the Hearing Officer's rulings are free from prejudicial error, we deny Respondent's motion to reopen the hearing.

B. *The Work in Dispute*

The work in dispute is the timing function performed in connection with the production of video tape television commercials by the Employer.

C. *Contentions of the Parties*

The Guild claims that no violation of Section 8(b)(4)(D) has occurred and that the case should be dismissed. It urges that the proceeding is representational in nature, that NABET's threat was a "sham" because other remedies were available to NABET, and that the Employer is engaged in contract avoidance. On the merits, the Guild contends that its contract with the Employer requires assignment of the disputed work to associate directors whom it represents. It urges that an award to associate directors represented by the Guild would be more efficient and would conform to industry practice. Finally, the Guild claims that employees it represents do not have an available job market of sufficient scope to make up the work which would be lost.

The Employer contends that the case is properly before the Board for a determination of the dispute. On the merits, the Employer urges that the disputed work be awarded to the script supervisors represented by NABET. In support of its preference, the Employer relies on its past practice as well as industry practice, and claims that skills, economy, and efficiency all favor an award to script supervisors represented by NABET.

NABET also contends that the case is properly before the Board for a determination of the dispute, and, generally, relies on the same factors as the Employer to support an award to script supervisors represented by NABET.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that (1) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and (2) the parties have not agreed upon a method for the voluntary adjustment of the dispute.

As to (1) above, the record establishes that, on March 24, 1981, James Wilson, NABET's associate business manager, contacted the Employer and threatened to strike unless the Employer met NABET's demand that it employ script supervisors represented by NABET to perform the disputed work. As to (2) above, there is no contention that a voluntary method for adjusting the dispute exists which would be binding on all parties.

Accordingly, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that the dispute is properly before the Board for determination under Section 10(k) of the Act.[2]

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after taking into account the evidence supporting the claims of the parties and balancing all relevant factors.[3]

We shall set forth below those factors which we find relevant in determining the dispute herein.

1. Collective-bargaining agreements

The Guild and NABET each contends that its respective contract with the Employer supports its claim to the disputed work. We find support for the contentions of each party in its respective contract.

We note, in particular, that the Guild's contract refers specifically, in the functions section, to associate directors' performing "timing functions." However, the Guild's contract, in the general conditions section, also states that the Employer shall not be required to assign an associate director where the associate director's duties are required to be performed by employees under a previously existing contract. The parties disagree as to the application of that section here. Although there is a conflict and some confusion in the record, it appears that the NABET contract covering script supervisors, dated March 5, 1974, preceded the Guild's tape contract with the Employer signed in 1975. In this connection, Rothberg's uncontroverted testimony is that he discussed the assignment of timing functions with the Guild's representative, Glenn Gumpel, during the negotiations in 1975, explaining that the script supervisors should do the work. According to Rothberg, Gumpel replied that the Employer either sign the contract as it was or not at all.

---

[2] The Guild contends that no valid legitimate threat was made by NABET which was intended to coerce the Employer in the assignment of the disputed work, and that a jurisdictional dispute does not exist here. In support of its contention, the Guild relies on then Chairman Fanning's dissenting opinion in *Newark Typographical Union No. 103 a/w International Typographical Union, AFL-CIO (Elizabeth Daily Journal, a Division of Mid-Atlantic Newspapers)*, 220 NLRB 4, 7 (1975). That case differs materially from the instant case, perhaps most significantly because the members of the union making the alleged threat were already performing the disputed work. Here, employees represented by the Guild were performing the disputed work when NABET threatened to strike unless the disputed work was assigned to script supervisors represented by NABET. Accordingly, we find no merit in the Guild's contention.

[3] *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961); *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402, 1410-11 (1962).

On the record as a whole, including certain concessions by counsel for the Guild,[4] we find that the contracts here support an award to employees represented by each of the respective Unions, but that the contracts, alone, do not require an award to one group of employees over the other.

2. Past practice, assignment, and preference

From 1975 until the end of 1980 the Employer has alternated, not equally, the assignment of the disputed work between script supervisors represented by NABET and associate directors represented by the Guild. Lee Rothberg, the Employer's president, testified that its hiring of one group of employees over the other was influenced, often times, by which of the groups' respective collective-bargaining representatives was exerting the most pressure. Rothberg's testimony, corroborated and supported by the testimony of Walter Hamilton, the Employer's director of operations and executive producer, also shows that the disputed work was assigned predominantly to script supervisors represented by NABET during this period.[5]

Since late 1980, the Employer has been assigning the disputed work exclusively to associate directors represented by the Guild. This current assignment commenced, according to Rothberg, after the Guild threatened that it would strike the Employer and that it would refuse to enter into any future contracts with the Employer unless it assigned such work to associate directors whom it represents. At the same time, the Guild fined Rothberg as an individual member of the Guild for his past assignments to NABET script supervisors.

Rothberg has made clear on this record that he prefers to assign the disputed work to script supervisors.

3. Skills and economy and efficiency of operations

The Employer's president, Rothberg, testified that script supervisors are better trained and qualified, and that their performance of the timing function is better than that of associate directors. He explained that script supervisors are experienced in timing video tape commercials which require only a single camera (as here), and that they time the segments more accurately and transcribe script notes more clearly. He further testified that associate directors are trained to work in film broadcasting where several cameras and larger crews are used. Rothberg also testified that, as a result of dissatisfaction with the job performance of associate directors, he has complained to the Guild on numerous occasions. Hamilton, the Employer's director of operations and executive producer, also testified concerning the script supervisors' superior job performance.

The Guild presented no specific evidence concerning the skills or training of its members but repeatedly pointed out that many of its members have actually performed satisfactorily the disputed work. It contends that skills and economy and efficiency favor an award to associate directors because there are more associate directors than script supervisors available to perform the work, that associate directors are more versatile because they also can perform stage manager functions, and that costs should not be a factor.

On the record as a whole, we find that the skills of the script supervisors and the economy and efficiency of the Employer's operations favor an award of the disputed work to script supervisors represented by NABET.

4. Industry practice

James Wilson, associate business manager for NABET, testified that NABET has signed contracts almost identical to the one it has with the Employer with approximately 100 other commercial producers,[6] including approximately 45 in the New York City area. Upward of 30 script supervisors service these signatories. Rothberg also testified that other commercial producers in the New York City area use script supervisors to perform the timing function on commercials, but it appears that his knowledge of other producers pertains primarily to film rather than video tape commercials.

The Guild claims in its brief that the evidence relating to industry practice is contradictory and that the timing function is handled by associate directors in video tape work and by script supervisors in film commercials. William F. Grief, a Guild field representative, testified that he had never observed a script supervisor perform the timing function in his visits to 15–18 commercial video tape houses who do not have contracts with the Guild or to 20–30 others who do have contracts with the

[4] Counsel for the Guild conceded during the hearing that the Employer has contractual obligations with both Unions covering timing functions and the NABET contract requires the Employer to give the work to script supervisors and the Guild contract requires the Employer to give the work to associate directors. Thus, he stated that the Employer hires a script supervisor because he has a contract that requires him to do so.

[5] The Guild attached to its brief certain documents bearing on the assignments which it now seeks to introduce into the record. The Guild acknowledges in its brief that these documents were produced by the Employer at the hearing pursuant to a Guild subpena. The documents were never admitted into evidence and the Guild offers no explanation for the failure to offer them at the hearing. We have not considered these documents.

[6] Wilson testified that the only difference is that approximately one-half of these contracts, unlike the Employer's contract with NABET, do not contain union-security provisions.

Guild. He further testified that 10–12 of those employers with Guild contracts also have NABET contracts and that the industry practice is for associate directors to perform timing work in video tape commercials in the New York City area.

On the basis of the record evidence, we do not find that industry practice is sufficiently clear to favor one group of employees over the other.

5. Job impact

The Guild urges that the disputed work be awarded to associate directors it represents because loss of this disputed work would have a greater job impact on associate directors than on script supervisors. In support of its position, the Guild claims that there is a broader job market for script supervisors and that there are substantially fewer script supervisors than associate directors to compete for the disputed work.

In assessing the Guild's contention, we note that our determination here is limited to the particular controversy which gave rise to this proceeding. No basis exists on this record for finding that an award to employees represented by one union will have more impact than an award to employees represented by the other.[7] Accordingly, we do not find that this factor favors one group of employees over the other.

[7] Cf. *Newspaper Guild of New York, Local 3, The Newspaper Guild, AFL-CIO-CLC (New York Times Company)*, 249 NLRB 948, 951 (1980).

Conclusion

Upon the entire record in this proceeding and after full consideration of all the relevant factors, we conclude that the Employer's employees who are represented by NABET are entitled to perform the work here in dispute. We reach this conclusion on the basis of the Employer's preference as well as skills and economy and efficiency of operations. Accordingly, we shall determine the dispute by awarding the disputed work to the Employer's employees represented by NABET, but not to any labor organization of which these employees are members. Our determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

Employees of Lee Rothberg Productions, Inc., currently represented by National Association of Broadcast Employees and Technicians, AFC Local 15, AFL-CIO, are entitled to perform the timing function performed in connection with the production of video tape television commercials by the Employer.